

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

v

JOHN DAVID NIEMIEC,  
  
Defendant-Appellant.

UNPUBLISHED  
December 23, 2008

No. 277212  
Macomb Circuit Court  
LC No. 2006-003117-FC

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

v

JOHN DAVID NIEMIEC,  
  
Defendant-Appellant.

No. 277237  
Macomb Circuit Court  
LC No. 2006-003114-FH

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Kelly, J. (*concurring in part and dissenting in part.*)

I respectfully dissent from the majority’s determination that the prosecution did not engage in misconduct by questioning defendant and his girlfriend on the credibility of other witnesses and that counsel was not ineffective by failing to object to the improper questions. I nevertheless concur in the majority’s decision to affirm defendant’s convictions because defendant was not so prejudiced by counsel’s deficiency that there was a reasonable probability that, without the error, the outcome would have been different. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005).

During the cross-examination of defendant, the prosecutor asked whether a testifying officer had fabricated one of defendant’s interview answers. In my opinion, the question is clearly improper and counsel was ineffective in failing to object. Our Supreme Court has decisively held that it is “improper for the prosecutor to ask defendant to comment on the credibility of prosecution witnesses. Defendant’s opinion of their credibility is not probative of the matter.” *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). Moreover, MRE 701 limits lay witness testimony to only “those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful

to a clear understanding of the witness' testimony or the determination of a fact in issue.” Here, the only purpose and clear thrust of the prosecutor’s question was to solicit defendant’s opinion on the police officer’s credibility or to discredit defendant by inviting him to label the police officer as a liar. The fact that defendant responded that he did not know is immaterial: defendant was invited to comment upon the officer’s credibility, defendant did and defendant’s answer did not cure the prosecutor’s question of its impropriety. The determination of witness credibility is the sole province of the jury, *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), mod 441 Mich 1201 (1992), and the question invaded the jury’s province of assessing the officer’s credibility, *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007).

The prosecutor also asked defendant’s girlfriend whether defendant would be lying if defendant testified that he had never been arrested on drug charges. For the same reason, this question was likewise improper, regardless of the prosecution’s purpose in posing the question. The question required the witness to comment upon defendant’s credibility and “credibility matters are to be determined by the jury.” *Id.*

Counsel should have objected to this line of questioning and any error would have been cured by either the preclusion of further questioning or by obtaining a cautionary instruction. *Buckley, supra* at 18. On this particular issue, counsel was ineffective by failing to object. But, as noted by the majority, in addition to showing that counsel’s performance was objectively unreasonable, defendant must also establish that, but for defense counsel’s errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Here, despite the improper questioning, there is no reasonable probability that the result of the trial would have been any different. The testimony of the victims was very detailed and corroborated by other witness’ testimony. Other evidence and testimony significantly impeached defendant’s version of events. The outcome of the trial was not affected by the error of defendant’s counsel. Thus, I concur in affirming defendant’s convictions.

/s/ Kirsten Frank Kelly